

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

SUMMARY ORDER

Rulings by summary order do not have precedential effect. Citation to summary orders filed after January 1, 2007, is permitted and is governed by this court's Local Rule 32.1 and Federal Rule of Appellate Procedure 32.1. In a brief or other paper in which a litigant cites a summary order, in each paragraph in which a citation appears, at least one citation must either be to the Federal Appendix or be accompanied by the notation: "(summary order)." A party citing a summary order must serve a copy of that summary order together with the paper in which the summary order is cited on any party unless the summary order is available in an electronic database which is publicly accessible without payment of fee (such as the database available at <http://www.ca2.uscourts.gov/>). If no copy is served by reason of the availability of the order on such a database, the citation must include reference to that database and the docket number of the case in which the order was entered.

At a stated Term of the United States Court of Appeals for the Second Circuit, held at the Daniel Patrick Moynihan United States Courthouse, at 500 Pearl Street, in the City of New York, on the 2nd day of March, two thousand nine.

Present: HON. AMALYA L. KEARSE,
HON. ROBERT A. KATZMANN,
Circuit Judges,
HON. JOSEPH F. BIANCO,
*District Judge.**

KIN LONG KO, also known as Peter Ko,

Petitioner,

Nos. 08-0509-ag(L), 08-2288-ag(Con)

- v -

ERIC H. HOLDER, Jr., Attorney General,**

Respondent.

* The Honorable Joseph F. Bianco, United States District Judge for the Eastern District of New York, sitting by designation.

** Pursuant to Federal Rule of Appellate Procedure 43(c)(2), Attorney General Eric H. Holder, Jr. is substituted for former Attorney General Michael B. Mukasey as the respondent in this case.

For Petitioner:

MICHAEL P. DiRAIMONDO (Marialaina L. Masi and Stacy A. Huber, *on the brief*), DiRaimondo & Masi LLP, Melville, N.Y.

For Respondent:

CINDY S. FERRIER, Senior Litigation Counsel (Gregory G. Katsas, Assistant Attorney General, Michelle Gordon Latour, Assistant Director, *on the brief*), Office of Immigration Litigation, United States Department of Justice, Washington, D.C.

Petition for review of two decisions of the Board of Immigration Appeals.

ON CONSIDERATION WHEREOF, IT IS HEREBY ORDERED, ADJUDGED, AND DECREED that the petition for review is **DENIED**.

Petitioner Kin Long Ko petitions for review of two decisions of the Board of Immigration Appeals (“BIA”). The first is a January 2, 2008 decision in which the BIA dismissed Ko’s appeal of an August 1, 2005 decision of Immigration Judge (“IJ”) Joanna Miller Bukszpan denying Ko’s motion for a waiver of inadmissibility under former section 212(c) of the INA, 8 U.S.C. § 1182(c). The second is an April 22, 2008 decision in which the BIA denied Ko’s motion to reconsider that decision and reopen his proceedings. We assume the parties’ familiarity with the underlying facts and procedural history of the case.

A. The January 2, 2008 Decision

Although Ko entered deportation proceedings in 1993, the BIA did not issue its decision until 2008. Our review of his petition therefore is governed by 8 U.S.C. § 1252. *See Nethagani v. Mukasey*, 532 F.3d 150, 153 (2d Cir. 2008). We defer to the BIA’s findings of fact as “conclusive unless any reasonable adjudicator would be compelled to conclude to the contrary.” 8 U.S.C. § 1252(b)(4)(B). We review questions of law *de novo*. *Iouri v. Ashcroft*, 487 F.3d 76, 83 (2d Cir. 2007).

Ko's first application for section 212(c) relief was denied by IJ John Bryant on September 25, 1995. Ko contends that he is eligible for section 212(c) relief *nunc pro tunc* because he had been incarcerated for fewer than five years for aggravated felonies at the time that IJ Bryant denied that application. We have held, however, that *nunc pro tunc* relief is available only where petitioners "demonstrate that they were erroneously denied the opportunity to apply for § 212(c) relief, and that, but for *nunc pro tunc* relief, this denial would be irreparable." *Edwards v. INS*, 393 F.3d 299, 312 (2d Cir. 2004). Ko argues that IJ Bryant erroneously denied his section 212(c) application in 1995 because he should have applied this Court's decision in *Lok v. INS*, 548 F.2d 37 (2d Cir. 1977), when calculating the length of Ko's lawful unrelinquished domicile. But even assuming that (1) Ko's reading of *Lok* is correct, and (2) IJ Bryant was bound by *Lok*'s holding, the only evidence as to when Ko attained "lawful" status indicated that he did so on November 2, 1989, the date on which he was granted temporary residency. We therefore agree with the BIA that Ko had not accrued the requisite seven years of lawful unrelinquished domicile on September 25, 1995, even under his own approach. Thus, IJ Bryant did not erroneously deny Ko's section 212(c) application, and consequently Ko is ineligible for *nunc pro tunc* relief. *See Edwards*, 393 F.3d at 311 n.15.

B. The April 22, 2008 Decision

We review the BIA's denial of a motion to reopen and of a motion to reconsider for abuse of discretion. *See Jian Hui Shao v. Mukasey*, 546 F.3d 138, 168-69, 174 (2d Cir. 2008).

The BIA plainly articulated its reasons for denying each of Ko's motions. It denied Ko's motion to reconsider on the ground that the legal authority cited in support of the motion, *Yesil v. Reno*, 958 F. Supp. 828 (S.D.N.Y. 1997), could have been raised much earlier in the proceedings.

See In re O-S-G, 24 I. & N. Dec. 56, 57 (B.I.A. 2006) (“A motion to reconsider based on a legal argument that could have been raised earlier in the proceedings will be denied.”). It denied Ko’s motion to reopen on the ground that Ko failed to explain why the INS receipt was not available and could not have been discovered or presented earlier in the proceedings. *See* 8 C.F.R. § 1003.2(c)(1) (“A motion to reopen proceedings shall not be granted unless it appears to the Board that evidence sought to be offered is material and was not available and could not have been discovered or presented at the former hearing . . .”). We see no abuse of discretion in either of these decisions.

We have considered Ko’s arguments and find them to be without merit. Accordingly, the petition for review is hereby **DENIED**.

FOR THE COURT:
CATHERINE O’HAGAN WOLFE, CLERK

By: _____